UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARK E. WOTTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-410-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue of whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from multilevel degenerative disc disease and degenerative joint disease of the spine, is capable of performing the full range of light work. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 7, 1999, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge found, in relevant part, that the plaintiff suffered from multilevel degenerative disc disease and degenerative joint disease of the spine, status post disc excision at the lumbosacral spine (September 1997[2]), in particular a herniated nucleus pulposus at the L-5/S-1 level of the spine (with bilateral narrowed neural foramina and scar tissue at that level) and a protruded disc at the C-6/C-7 level of the spine, as well as polypharmacy abuse and dependency, Finding 3, Record p. 26; that at no time relevant to the decision had the plaintiff suffered from any impairment that met or equalled the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 4, Record p. 26; that in consequence of his impairments the plaintiff was limited to the performance of work activity of a light exertional level, Finding 7, Record p. 27; that the plaintiff's testimony and written allegations regarding his pain, his general symptomatology and the functional limitations imposed upon him by his impairments were not fully credible and were not consistent with the objective medical evidence of record and the opinions of his treating physicians, Finding 8, Record p. 27; that the plaintiff's impairments prevented him from returning to the sustained performance of his past unskilled jobs as a commercial fisherman and as a dock hand[3] and cook for a commercial fishing concern, both of which were substantially more than light in their exertional demands, Finding 9, Record p. 27; and that given his age (37), education (10th grade) and previous work experience (unskilled), application of Rule 202.17 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") led to a conclusion that there existed, in significant numbers in the national economy, other jobs the plaintiff could be expected to perform, Findings 5-6,

[2] This appears to be a typographical error. The evidence reveals that the plaintiff underwent back surgery in September 1987. *See* Record pp. 289-90.

[3] The record indicates that the plaintiff worked as a "deck hand." Record p. 111.

9-10, Record p. 27. The Appeals Council declined to review the decision, Record pp. 6-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff contends that the opinion of the administrative law judge fails to meet this standard in four respects: (i) lack of medical support for the finding of a residual functional capacity ("RFC") for the full range of light work, (ii) unexplained failure to adopt the RFC assessments of the agency's own medical consultants, in violation of Social Security Ruling 96-5p, (iii) failure to evaluate pain in the manner required by Social Security Rulings 96-7p and 96-8p, 20 C.F.R. § 404.1515 and *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986) and (iv) failure to assess credibility properly pursuant to Social Security Ruling 96-7p. Itemized Statement

of Errors, etc. ("Statement of Errors") (Docket No. 3) at 2-6. I disagree.

I. Statements of Error (i) and (ii): Unsubstantiated Residual Functional Capacity

Light work is described in applicable Social Security regulations as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. §§ 404.1567(b), 416.967(b). In addition, light work has been further defined by Social Security Ruling 83-10 as follows: "[T]he full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time. The lifting requirement for the majority of light jobs can be accomplished with occasional, rather than frequent, stooping." Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 29.

The record contains two RFC assessments, completed by Social Security consultants Lawrence P. Johnson, M.D. on April 11, 1997 and James H. Hall, M.D. on August 5, 1997. Record pp. 146-53, 163-70. The plaintiff claims that neither supports the administrative law judge's RFC finding, Statement of Errors at 2-3; however, that of Dr. Hall does.

Dr. Hall found the plaintiff capable of lifting or carrying twenty pounds occasionally and ten pounds frequently and standing and/or walking with normal breaks for a total of about six hours in an eight-hour workday. *Id*. at 164. He found the plaintiff incapable of ever climbing on ladders,

ropes or scaffolds and restricted to occasional stooping and crouching.[4] *Id.* at 165. He further observed that the plaintiff should avoid concentrated exposure to uneven floors and rough terrain. *Id*. at 167. Dr. Hall thus found the plaintiff capable of performing the basic lifting, carrying, standing and walking requirements of light work. As the commissioner argued persuasively at oral argument, the remaining limitations noted by Dr. Hall do not significantly erode the occupational base for the full range of light work. Relatively few jobs in the national economy require ascending or descending ladders and scaffolding. Social Security Ruling 83-14, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 43. In addition, the performance of substantially all of the exertional requirements of most sedentary and light jobs requires no crouching and only occasional stooping. *Id.* at 44. The final restriction (that the plaintiff need avoid only concentrated exposure to uneven floors and rough terrain) is by its terms minimal.

The administrative law judge, moreover, had available ample evidence that the plaintiff continued to work sporadically as a commercial fisherman — work that was very heavy in its exertional demands. *See, e.g.*, Record pp. 25 (characterization of fishing work as very heavy); 265 (doctor's note as of January 6, 1997 that plaintiff "has been fishing (though not for the last 3 weeks)" and had been "doing quite well" during previous nine months); 270 (doctor's note as of July 14, 1997 that plaintiff "is working regularly in one role or another. Currently he is tuna fishing."). This evidence understandably flavored the administrative law judge's view of the extent of work the

[4] Dr. Johnson's assessment was similar, although Dr. Johnson found the plaintiff capable of standing and/or walking with normal breaks for a total of only about four hours in an eight-hour workday. *See id.* at 147-48, 150.

plaintiff was capable of performing, tilting the scales in favor of the less restrictive finding of RFC.[5]

II. Statements of Error (iii) and (iv): Improper Pain, Credibility Determinations

The administrative law judge implicitly determined that the plaintiff's pain did not impose any limitation on his capacity to function in a light-work job, concluding: "I find that the claimant's testimony and written allegations regarding the pain he experiences, his general symptomatology, and the functional limitations imposed upon him by his impairments are not fully credible and not consistent with the objective medical evidence in this record and the opinions of his treating physicians." *Id.* at 24.

The plaintiff complains that the administrative law judge, in so concluding, failed to assess his complaints of pain adequately. Statement of Errors at 5. The administrative law judge relied heavily on the plaintiff's use of prescribed painkillers, yet the plaintiff's treating physicians do not indicate that the plaintiff does not experience severe pain. *Id*. In the plaintiff's view his usage of pain medication supports, rather than undercuts, his claims of pain. *Id*. The plaintiff also attacks the administrative law judge's unfavorable credibility determination on grounds that (i) the administrative law judge relied on the plaintiff's sporadic work attempts even though he acknowledged that the plaintiff cannot perform such work on a regular basis, and (ii) the administrative law judge did not substantiate his conclusion that the plaintiff's testimony was unsupported by objective medical evidence. *Id*. at 5-6.

The commissioner is required to consider all of a claimant's symptoms, including pain, when determining whether a claimant is disabled. 20 C.F.R. §§ 404.1529(a), 416.929(a). In assessing

[5] The commissioner at oral argument suggested that had this evidence been available to Drs. Johnson and Hall, they would not have been as generous in their RFC limitation assessments.

whether pain or other symptoms restrict a claimant's ability to work, the commissioner must first determine whether there is a medically determinable impairment that could reasonably be expected to produce such symptoms. 42 U.S.C. § 423(d)(5)(A); *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986); Social Security Ruling 96-7p, *reprinted in West's Social Security Reporting Service*, Rulings 1983-1991 (Supp. 1997-98), at 117. "If there is no medically determinable physical or mental impairment(s), or if there is a medically determinable physical or mental impairment(s) but the impairment(s) could not reasonably be expected to produce the individual's pain or other symptoms, the symptoms cannot be found to affect the individual's ability to do basic work activities." Social Security Ruling 96-7p at 118.

If, on the other hand, a claimant demonstrates the existence of a medically determinable impairment that could reasonably be expected to cause the symptoms alleged, the commissioner must give full consideration to all of the available objective medical evidence that reflects on the impairment to evaluate the degree of functional limitation caused by the symptoms. 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2); *Avery*, 797 F.2d at 21, 23. The commissioner must also, in reaching this second step, consider a claimant's subjective complaints. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); Social Security Ruling 96-7p at 118. "Because symptoms, such as pain, sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, the adjudicator must carefully consider the individual's statements about symptoms with the rest of the relevant evidence in the case record in reaching a conclusion about the credibility of the individual's statements . . . ." Social Security Ruling 96-7p at 117.[6]

[6] Evidence that bears on the credibility of a claimant's subjective complaints includes (i) the claimant's activities of daily living, (ii) the location, duration, frequency and intensity of the pain or (continued...)

The adjudicator is free to determine that a claimant's testimony regarding his pain or other symptomology is not credible. *Da Rosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986). This determination, however, must be supported by substantial evidence, and the administrative law judge must make specific findings as to the relevant evidence in determining that the plaintiff's testimony is not credible. *Id*. When supported with specific findings, an administrative law judge's determination that a claimant's subjective complaints of pain or other symptoms are not credible is entitled to deference.[7] *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

In his hearing testimony the plaintiff described functional limitations that included inability to sit, stand or walk for any length of time and "bad spells" in which he was bedridden and had to urinate in a milk jug or crawl into the bathroom. Record pp. 50, 89, 127. He complained of neck pain, migraine-type headaches, back pain and significant radiations of pain, including into his shoulder, arm, hand, buttocks, legs and toes. *Id*. at 48, 134, 136, 138.

The administrative law judge found the plaintiff's allegations of pain and other symptomology inconsistent with the medical evidence, including that from treating physicians, and not fully credible. *Id*. at 24. In reaching this conclusion, he cited (i) extensive evidence of the plaintiff's dependency on pain-killing drugs, raising serious questions whether the plaintiff had

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[6] (...continued)
other symptoms, (iii) factors that precipitate and aggravate the symptoms, and (iv) treatments and their side effects. 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3).

[7] "The RFC assessment must include a discussion of why reported symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical and other evidence. In instances in which the adjudicator has observed the individual, he or she is not free to accept or reject that individual's complaints *solely* on the basis of such personal observations." Social Security Ruling 96-8p at 131.

exaggerated symptoms to obtain narcotics, (ii) evidence of work activity inconsistent with the allegation that the plaintiff could not walk, sit or stand for any length of time, (iii) the plaintiff's inaccurate representation of his work history in applying for Social Security benefits, and (iv) a pattern of cancellation of scheduled tests and procedures. *Id.*

Assuming *arguendo* that the administrative law judge erred in concluding that the plaintiff's allegations were unsupported by objective medical evidence, the error was harmless. The administrative law judge engaged in the type of careful consideration of credibility required when (and only when) there is a medically determinable impairment that reasonably could be expected to cause the symptoms alleged. He made specific findings as to his reasons for discrediting the plaintiff's testimony, each of which is supported by substantial evidence of record as follows:

1. Drug Usage: The record is replete with instances in which treating physicians expressed concern over the plaintiffs' requests for pain-killing drugs, sometimes refusing to refill prescriptions. *See*, *e.g.*, *id*. at 254 (2/2/93 - planning to inform plaintiff he could not use this much narcotic); 256 (5/12/93 - declining to refill prescription of Vicodin); 259 (6/93 - warning emergency room not to dispense narcotics unless plaintiff followed through with MRI and appointment); 190 (11/22/93 - noting that plaintiff could not go on using Percocet indefinitely); 217 (10/94 - noting that plaintiff non-compliant with physical therapy; physician could not continue to make narcotics available); 213 (5/17/96 - plaintiff advised that physician uncomfortable continuing Percocet on regular basis and had declined further renewals at that time); 210 (11/27/96 - physician not going to get into pattern of regular prescriptions for narcotics); 239 (2/3/97 - noting that Vicodin not something plaintiff can use on long-term basis); 269 (5/8/97 - last Vicodin refill until next office visit). One physician wrote on June 1, 1993: "I'm not going to be conned out of more narcotics in the context of miraculous

recoveries, etc." *Id*. at 259. Dr. Johnson concluded that the plaintiff had exaggerated his pain symptoms, which were not supported by objective medical evidence, possibly to receive narcotics. *Id*. at 151. Dr. Hall noted that the plaintiff's need for narcotic pain medication, among other things, raised questions about the source of his pain and his complaints. *Id*. at 168.

2. Work Activity: Physicians' notes document that, except for 1994-95, the plaintiff continued to work periodically following the onset of alleged disability on February 2, 1993. *See, e.g.*, *id.* at 257 (5/27/93 - out fishing past week, having increased pain); 262 (8/12/93 - had been out fishing); 189 (9/93 - planning to be out fishing steadily); 190 (11/9/93 - had to go out fishing the past week); 187 (1/94 - had been out shrimping); 214 (2/14/96 - "back working"); 221 (12/96 - about to leave on a five-day fishing trip); 270 (7/97 - had been out tuna fishing, clam digging and eel fishing). While this evidence tends to show that fishing work exacerbates the plaintiff's symptoms, it contradicts his claimed inability to sit, stand or walk for any length of time.

3. Inaccurate Representation: In his application for benefits, dated January 31, 1997, the plaintiff reported the performance of only two jobs after February 2, 1993: shrimp dragging in February 1994 and work as a deck hand and cook in November 1996. *Id*. at 77, 111. This constituted a significant underreporting for which no justification appears of record, casting doubt on the plaintiff's overall credibility.

4. Pattern of Cancelling Appointments: The plaintiff on several occasions cancelled scheduled treatments or visits. *See, e.g.*, *id*. at 256 (5/20/93 - could not afford MRI); 258 (6/7/93 - feeling 90 percent better; cancelled myleogram but not MRI; 6/10/93 - cancelled MRI because had no insurance or money and had miraculous recovery); 195 (7/2/93 - decided not to follow through on surgery because much improved); 217 (10/94 - plaintiff non-compliant with physical therapy);

204-05 (6/27/95 - unable to undergo physical therapy because of illness in family); 213 (4/17/96 - plaintiff had no insurance and could not afford physical therapy). The plaintiff offered facially legitimate excuses for his non-compliance. However, in view of the plaintiff's documented drug dependency, the administrative law judge justifiably could have questioned whether the underlying pain and symptomology were exaggerated to obtain narcotics, upon receipt of which the plaintiff avoided follow-up treatment.

Inasmuch as the administrative law judge made specific findings regarding his reasons for discrediting the plaintiff, each of which is supported by substantial evidence of record, his assessment of credibility is entitled to deference.

III. Conclusion

Because the commissioner's determination that the plaintiff is capable of the full range of light work is supported by substantial evidence of record, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 17th day of May, 1999.

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David M. Cohen
United States Magistrate Judge